

ORDERED.

Dated: December 28, 2021



 Grace E. Robson
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
 MIDDLE DISTRICT OF FLORIDA
 ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
Gary R. Graybill, as Personal Representative of the Estate of Catherine Eckley Bentley,)	Case No. 6:17-bk-00294-GER Chapter 7
)	
Debtor.)	
)	

**ORDER (1) AWARDING FEES AND EXPENSES OF TRUSTEE
AND TRUSTEE’S COUNSEL, (2) GRANTING TRUSTEE’S MOTION
TO PAY FEES AND COSTS OF TRUSTEE, AND (3) DENYING MOTION
TO MAKE INTERIM DISTRIBUTION TO CERTAIN UNSECURED CREDITORS**

This matter came before the Court on December 14, 2021 at 11:00 a.m. upon the First Application for Interim Compensation as Counsel for Chapter 7 Trustee¹ and the Application for Compensation for Robert E. Thomas, Trustee Chapter 7 (collectively, “Applications”);² the Motion to Make Interim Distribution to Certain Unsecured Creditors³ and the Motion for Approval of Interim Distribution of Trustee’s Fees and Expenses⁴ filed by the Trustee (collectively, the

¹ Doc. No. 196. All “Doc. No.” citations refer to pleadings filed in the Main Case, 6:17-bk-00294-GER, unless otherwise noted.
² Doc. No. 197.
³ Doc. No. 195.
⁴ Doc. No. 198.

“Motions”); and the objection thereto (the “Objection”)⁵ filed by Gary R. Graybill, as Personal Representative of the Estate of Catherine Eckley Bentley (“Graybill”).⁶ The Court, having reviewed the Applications, Motions, Objection, and the record in this case, does **FIND, ORDER AND ADJUDGE** as follows:

Background

This case was filed as a voluntary chapter 7 on January 13, 2017.⁷ The deadline for filing claims was October 23, 2017. As of today, there are only four allowed claims in this case. Dr. Susan Kolb holds the largest claim in the amount of \$133,141.12 (Claim No. 4). The remaining three creditors’ claims total \$1,273.66.

During the course of this bankruptcy case, the Trustee successfully objected to the Debtor’s claim of homestead pursuant to 11 U.S.C. § 522(o), resulting in the reduction of the Debtor’s homestead exemption by \$112,767.04.⁸ Further, by separate order, the Bankruptcy Court imposed an equitable lien and constructive trust in the same amount, \$112,767.04, in favor of Dr. Kolb.⁹ In addition, Dr. Kolb’s claim was allowed in the amount of \$133,141.12, that debt was determined to be not dischargeable, and the Debtor’s discharge was denied.¹⁰ The Bankruptcy Court’s rulings on the reduction of the homestead exemption, allowance of Dr. Kolb’s claim, and the imposition of the equitable lien and constructive trust, were appealed and ultimately affirmed by the Eleventh Circuit on April 22, 2020.¹¹

⁵ Objection to Distribution Pending Appeal and Oral Argument Scheduled on January 24, 2022 (Doc. No. 200).

⁶ The original debtor in this case was Catherine Eckley Bentley, who is now deceased. Graybill is Bentley’s nephew and the personal representative of the estate. This opinion refers to Bentley and Graybill interchangeably as the “Debtor.”

⁷ Doc. No. 1.

⁸ See Doc. No. 133.

⁹ See Final Judgment of Foreclosure, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. May 23, 2019), Doc. No. 145.

¹⁰ See Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00047-KSJ (Bankr. M.D. Fla. Apr. 9, 2019), Doc. No. 46.

¹¹ Doc. No. 189.

On May 29, 2019, the Debtor paid the Trustee \$113,451.76, and the Trustee promptly executed a Satisfaction¹² acknowledging satisfaction of the Final Judgment of Foreclosure,¹³ Order Sustaining Trustee's Objection and Reducing Debtor's Homestead Exemption,¹⁴ and the amounts subject of the constructive trust and equitable lien.¹⁵

In addition to the funds paid by the Debtor to satisfy the judgments and lien on the homestead, the Trustee also successfully negotiated a settlement of litigation with Auctions America by RM, Inc. ("Auctions America"), resulting in an additional \$56,000.00 into the estate.¹⁶ The Trustee has stated that he has liquidated the assets of the bankruptcy estate and is holding \$169,286.53 in the estate bank account.¹⁷

Issue on Appeal

After the settlement with Auctions America was approved, Graybill filed a motion arguing that the Bankruptcy Court should credit the \$56,000.00 settlement proceeds paid by Auctions America against the \$133,141.12 claim of Dr. Kolb and requesting that the Trustee be required to refund Graybill \$36,310.64¹⁸ (the "Motion for Credit").¹⁹ The Motion for Credit was denied,²⁰ and

¹² Satisfaction of Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. June 7, 2019), Doc. No. 153.

¹³ Final Judgment of Foreclosure, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. May 23, 2019), Doc. No. 145.

¹⁴ Doc. No. 133.

¹⁵ Order on Issues in Adversary 17-AP-119, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. Apr. 10, 2019), Doc. No. 120.

¹⁶ See Doc. Nos. 153 and 161; see also Agreed Order Granting Motion to Dismiss Adversary Proceeding, *Thomas v. Auctions America by RM, Inc. (In re Graybill)*, No. 6:18-ap-00045-KSJ (Bankr. M.D. Fla. Aug. 14, 2019), Doc. No. 54.

¹⁷ See Doc. No. 198, ¶ 3.

¹⁸ This amount is calculated by adding the amounts paid by the Debtor (\$113,451.76) and Auctions America (\$56,000.00), which totals \$169,451.76, then deducting Dr. Kolb's allowed claim amount of \$133,141.12.

¹⁹ Doc. No. 165. The Motion for Credit was also filed in Adversary Proceeding No. 6:17-ap-00047-KSJ, and Adversary Proceeding No. 6:17-ap-00119-KSJ. Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00047-KSJ (Bankr. M.D. Fla. Aug. 6, 2019), Doc. No. 59; and Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. Aug. 6, 2019), Doc. No. 165.

²⁰ Doc. No. 168; see also Order Denying Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00047-KSJ (Bankr. M.D. Fla. Oct. 11, 2019), Doc. No. 64; Order Denying Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. Oct. 11, 2019), Doc. No. 171.

the order denying the Motion for Credit was appealed to the District Court, which affirmed.²¹ Graybill appealed to the Eleventh Circuit, who has scheduled oral argument during the week of January 24, 2022 (the “Pending Appeal”).²²

Requests to Make Interim Distribution and Pay Interim Compensation

The Trustee seeks authority to make interim payments to creditors, his counsel, and himself. The Bankruptcy Code provides for awards of interim compensation.²³ “The purpose of interim compensation is to alleviate economic hardships that would otherwise visit court appointed officers committed to finance extended engagements.”²⁴

Here, the Trustee and his counsel seek an award and payment of interim compensation only after years of litigation in attempting to administer this bankruptcy estate. Specifically, the Trustee has requested approval to pay the following on an interim basis:

- a) interim distribution to three creditors whose claims total \$1,273.66, representing a 100% distribution;²⁵
- b) interim payment of compensation to Trustee’s counsel in the amount of \$95,000.00,²⁶ plus reimbursement of expenses in the amount of \$4,073.90;²⁷ and
- c) interim payment of the Trustee’s statutory compensation in the amount of \$8,800.00, plus reimbursement of expenses in the amount of \$1,230.48.²⁸

²¹ Doc. No. 193.

²² *Graybill v. Kolb*, No. 20-13079 (11th Cir. appeal docketed Aug. 14, 2020).

²³ See 11 U.S.C. § 331. Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

²⁴ *Cont’l Ill. Nat’l Bank & Trust Co. of Chicago v. Charles N. Wooten, Ltd. (In re Evangeline Refin. Co.)*, 890 F.2d 1312, 1321 (5th Cir. 1989) (quoting 2 *Collier on Bankruptcy* ¶ 331.01 (15th ed.)).

²⁵ Doc. No. 195.

²⁶ Reduced from the amount of \$263,519.75 that was actually incurred by counsel in providing the services.

²⁷ Doc. No. 196. Expenses have been reduced by \$11,312.86.

²⁸ Doc. No. 197. This amount is reduced from the statutory fee of \$11,782.59. See Doc. Nos. 197 and 198.

The above amounts total \$110,378.04; as noted above, the Trustee is holding \$169,286.53 in the estate bank account.

Objection by Graybill

Unsurprisingly, Graybill filed the Objection. Graybill objects to disbursement of any funds held by the Trustee on two grounds. First, Graybill argues that paragraph 11 of the Final Judgment of Foreclosure²⁹ requires the trustee to hold funds in the estate. Second, Graybill argues that the pending appeal divested the bankruptcy court of jurisdiction to authorize payments from funds in the estate.

A. The Proposed Payments Are Not Precluded by the Final Judgment of Foreclosure

The Final Judgment of Foreclosure authorizes the Trustee to administer, liquidate, sell, foreclose, and enforce the equitable lien and constructive trust in favor of Dr. Kolb, and subordinates Dr. Kolb's equitable lien and constructive trust claims to the Trustee's rights and authority to administer interests the real property.³⁰ Paragraph 11 of the Final Judgment of Foreclosure provides:

Until such time as the Court has ruled on all fees and costs associated with this Bankruptcy Case, related adversary proceeding, any pending appeal(s), and the sale, the Trustee shall hold all funds in the estate.³¹

Graybill argues that this paragraph requires the Trustee to continue to hold all funds in the estate until the Pending Appeal is resolved. The Court disagrees. The Trustee was directed to hold all funds pending final adjudication of: (1) the Trustee's objection to the Debtor's homestead exemption, (2) the Debtor's objection to Dr. Kolb's claim, and (3) the imposition of the constructive trust and equitable lien on the Debtor's homestead property. As the Eleventh Circuit

²⁹ Final Judgment of Foreclosure, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. May 23, 2019), Doc. No. 145.

³⁰ *See id.* at 2-3.

³¹ *Id.* at 4.

has ruled on those issues,³² there is no longer a requirement that the Trustee continue to hold funds in the estate.

B. The Bankruptcy Court Has Jurisdiction to Award and Allow Payment of Compensation

“As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive.”³³

Generally, an appeal divests the bankruptcy court of its control “over those aspects of the case which are involved in the appeal.”³⁴ However, “proceedings in bankruptcy should not halt merely because interlocutory orders are appealed.”³⁵ Instead, “a case should continue to be adjudicated on the merits by [the bankruptcy court] unless the order appealed from was of such a nature as to render further proceedings useless.”³⁶

Applicable here, the Court must determine whether the payment of fees and costs is collateral to the Debtor’s appeal of the Order Denying Motion for Credit.³⁷

The District Court framed the issue on appeal as “whether the Bankruptcy Court erred when it declined to reduce [Graybill’s] Final Judgment by the settlement amount obtained from Auctions America since both the Final Judgment and the settlement arose from the same injury.”³⁸ While Graybill requests that the Bankruptcy Court “direct the Trustee to refund the overpayment

³² See Doc. Nos. 189, 190, and 191.

³³ *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U.S. 426, 433, 44 S. Ct. 396, 399, 68 L. Ed. 770 (1924).

³⁴ *In re Norris Grain Co.*, 167 B.R. 258, 260 (Bankr. M.D. Fla. 1994).

³⁵ *Futch v. Roberts (In re Roberts)*, 291 F. App’x 296, 298 (11th Cir. 2008) (quoting *Mavity v. Assocs. Disc. Corp.*, 320 F.2d 133, 136 (5th Cir. 1963)).

³⁶ *Id.* (alteration in original).

³⁷ Doc. No. 168.

³⁸ Doc. No. 193, at 8. Here, the matter on appeal is the Bankruptcy Court’s Order Denying Debtor’s Motion for Credit Against Final Judgment for the Amount Paid by a Settling Co-Defendant, Auctions America entered on October 17, 2019 in the main case (Doc. No. 168) and two adversary proceedings (Order Denying Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. Oct. 11, 2019), Doc. No. 171; Order Denying Motion for Credit Against Final Judgment, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00047-KSJ (Bankr. M.D. Fla. Oct. 11, 2019), Doc. No. 64).

of \$36,310.64 to Debtor and keep the remaining funds paid by Debtor in the estate pending appeal,”³⁹ the Trustee’s request to pay fees and expenses is not collateral to a determination of whether the Bankruptcy Court should reduce the Final Judgment. The outcome of the appeal would not impact or alter the determination on the allowance or payment of the first priority administrative expenses awarded to the Trustee and his counsel on an interim basis.⁴⁰ In fact, the Trustee represented that the bankruptcy estate would have sufficient funds on hand to refund Graybill the \$36,310.64 if Graybill were to prevail on appeal. Any potential impact from the Trustee’s payment from funds in the estate is on the *pro rata* distribution, if any, to the four general unsecured creditors holding allowed claims in this case. Therefore, Graybill’s interests in the outcome of the Pending Appeal are not impacted by allowing payment of the fees and costs of the Trustee and his counsel.

C. Graybill Failed to Obtain a Stay Pending Appeal

Furthermore, Graybill did not seek or obtain a stay pending the appeal. As a result, the prevailing party, *i.e.*, the Trustee, may treat the Order Denying Debtor’s Motion for Credit Against Judgment for the Amount Paid by a Settling Co-Defendant, Auctions America (the “Order Denying Credit”) as final.⁴¹

Even if the Pending Appeal would be impacted by the payment of fees and costs, in the absence of a stay, there is nothing precluding the Trustee from relying on the Order Denying Credit and taking steps to finalize and close the estate. Seeking approval of compensation and making distributions are such steps and part of a trustee’s duties.

³⁹ Doc. No. 165, at 6.

⁴⁰ The fees and costs incurred by the Trustee are superior to claims of Dr. Kolb. *See* Final Judgment of Foreclosure, ¶ 3, *Kolb v. Graybill (In re Graybill)*, No. 6:17-ap-00119-KSJ (Bankr. M.D. Fla. May 23, 2019), Doc. No. 145; 11 U.S.C. §§ 506(c), 507(a)(2).

⁴¹ *See Sewanee Land, Coal & Cattle, Inc. v. Lamb (In re Sewanee Land, Coal & Cattle, Inc.)*, 735 F.2d 1294, 1295 (11th Cir. 1985) (quoting *Am. Grain Ass’n v. Lee-Vac, Ltd.*, 630 F.2d 245, 247 (5th Cir. 1980)).

Requests for Compensation

Applications for compensation are governed by §§ 330 and 331 of the Bankruptcy Code. Pursuant to those sections, the Court may award and allow payment of reasonable compensation for actual, necessary services rendered by a trustee and professionals employed by a trustee, including attorneys, as well as award reimbursement for actual, necessary expenses. In determining the amount of reasonable compensation to a trustee, the Court treats compensation as a commission based on the limitations set forth in § 326. In determining reasonable compensation to attorneys for a trustee, the Court considers the factors set forth in § 330(a)(3).

Here, the Trustee's request for compensation is based on the commission as calculated in § 326(a) of the Bankruptcy Code, and the Trustee requested authority to pay a reduced amount. The Trustee's request for expenses is based on actual expenses incurred. As a result, the Court concludes that the Trustee may be compensated the reduced fee of \$8,800.00, plus reimbursement of expenses totaling \$1,230.48, on an interim basis.

The Trustee's counsel seeks an interim award of compensation in the reduced amount of \$95,000.00 in fees and reimbursement of expenses totaling \$4,073.90 (the "Fee Application").⁴² A calculation of reasonableness of the rates and hours involves consideration of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*⁴³ These factors overlap with those set forth in § 330(a)(3) of the Bankruptcy Code. The Court, having carefully reviewed the Fee Application, finds that \$95,000.00 is reasonable compensation by counsel for the Trustee in providing actual and necessary services to the Trustee. The detail contained in the Fee Application satisfies the requirements in § 330 as well as the factors set forth in *Johnson*.⁴⁴ Likewise, the

⁴² Doc. No. 196.

⁴³ See *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 879 (11th Cir. 1990) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

⁴⁴ *Johnson*, 488 F.2d 714.

request for reimbursement of expenses, \$4,073.90 were for actual, necessary expenses incurred by counsel in providing services to the Trustee.

In sum, the fees and expenses requested are reasonable considering the amount of time spent, the complexity of the issues involved, and were necessary towards completion of this case. Furthermore, the amounts are being requested on an interim basis, and the Trustee has represented that if the payments of the proposed distributions and compensation were allowed to be paid, the bankruptcy estate would hold more than the \$36,310.46 at issue in the Pending Appeal.

The Proposed Distribution to Creditors

Finally, while the Court has determined that awarding and allowing payment of interim compensation is appropriate, the Court has determined it is not appropriate to authorize the Trustee to make an interim distribution to the three general unsecured creditors. While the proposed distribution amounts are small, the proposed distributions would represent a 100% distribution of the allowed claim amounts. As it is not certain that Dr. Kolb, who is also an unsecured creditor, will receive a 100% distribution, distribution to the three unsecured creditors should be deferred until such time it is clear what, if any, amounts will be distributed to *all* unsecured creditors.

For the foregoing reasons, it is **ORDERED**:

1. The Objection (Doc. No. 200) is **SUSTAINED IN PART** and **OVERRULED IN PART**.
2. The Motion to Make Interim Distribution to Certain Unsecured Creditors (Doc. No. 195) is **DENIED** without prejudice.
3. The Fee Application (Doc. No. 196) is **APPROVED** on an interim basis. The Court awards Akerman LLP fees in the amount of \$95,000.00 and expenses in the amount of \$4,073.90 on an interim basis.

4. The Application for Compensation for Robert E. Thomas, Trustee Chapter 7 (Doc. No. 197) is **APPROVED** on an interim basis. The Court awards the Trustee fees in the amount of \$8,800.00 and expenses in the amount of \$1,230.48 on an interim basis.

5. The Motion for Approval of Interim Distribution of Trustee's Fees and Expenses (Doc. No. 198) is **GRANTED**.

6. The Trustee is authorized to pay the fees and costs awarded in this Order.

7. The Court retains jurisdiction to interpret and enforce this Order.

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Attorney Esther A McKean is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and to file a proof of service within three (3) days of entry of this Order.